JACK J. SWAIN, SR., ET AL.

IBLA 94-393 Decided January 8, 1998

Appeal from a decision of the California State Office, Bureau of Land Management, declaring nine unpatented mining claims and one mill site claim abandoned and void for failure to pay rental fees. CAMC-57118, et al.

Affirmed in part, reversed in part, and remanded.

1. Mining Claims: Abandonment--Mining Claims: Contests--Mining Claims: Patent--Mining Claims: Rental or Claim Maintenance Fees: Generally

   The mere filing of a patent application is not sufficient to exempt a mining claimant from payment of the rental fees required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 for the claims covered by the application, when there is no evidence that the entry had been allowed by the authorized officer.

2. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

   A claimant seeking a small miner exemption from the payment of rental fees, required by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, for mining claims located on National Forest lands must be, on Aug. 31, 1993, under a notice or a plan of operations issued under parts 9 and 228 of 36 C.F.R. If the claimant does not meet this requirement for an exemption and no rental fees have been paid on or before Aug. 31, 1993, the mining claims are properly declared abandoned and void.

3. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

When a mining claimant holding 10 or fewer claims meets the requirements for a small miner exemption from the payment of rental fees for some of those claims, the fact that the other claims do not qualify for the exemption does not preclude the claimant from obtaining an exemption for the claims that qualify.

4. Mill sites: Generally--Mining Claims: Abandonment--Mining Claims: Millsites--Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

Neither the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 nor its implementing regulations contain language indicating that mill sites or tunnel sites cannot qualify for the exemption.

APPEARANCES: Jack J. Swain, Sr., pro se, and for Jon and Avalon L. Brunka, Bonita R. Swain, David Rex Swain, Richard A. Swain, Carl P. Swain, and Jack J. Swain, Jr.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Jack J. Swain, Sr., on behalf of himself and other claimants, has appealed from a Decision of the California State Office, Bureau of Land Management (BLM), dated March 1, 1994, declaring nine unpatented mining claims and one mill site claim abandoned and void because the claimants had failed to pay rental in the amount of $100 per claim or qualify for an exemption from payment. 1/

The BLM Decision references the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992), a provision of which required that each claimant "pay a claim rental fee of $100 to the Secretary of the Interior or his designee on or before August 31, 1993," for each unpatented mining claim, mill or tunnel site to hold such claim for the assessment year ending at noon on September 1, 1993. (Emphasis added.)

1/ The nine mining claims at issue are the Overall (CAMC 57118), Iron Hoop (CAMC 57119), Horse Shoe (CAMC 57120), The General No. 1 (CAMC 57121), The General No. 2 (CAMC 57122), General No. 7 (CAMC 57123), The General No. 3 (CAMC 115198), The General No. 5 (CAMC 115199), and The General No. 6 (CAMC 115200). The mill site, as described in BLM's Decision is the "All Iron Horse Mining Claim mill site (CAMC 57124)." (Decision at 1.) The question whether the claim designated CAMC 57124 is a mining claim or a mill site is discussed infra.

The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional $100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. Congress further mandated that "failure to make the annual payment of the claim rental fee as required by this Act shall conclusively constitute an abandonment of the unpatented mining claim, mill or tunnel site by the claimant * * *." 106 Stat. 1379; see also 43 C.F.R. § 3833.4(a)(2) (1993).

The only exemption provided from this rental fee requirement was the so-called "small miner exemption," available to claimants holding 10 or fewer mining claims, mill sites, or tunnel sites on Federal lands who met all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations required that a claimant apply for the small miner exemption by filing separate certificates of exemption on or before August 31, 1993, supporting the claimed exemption for each assessment year claimed. 43 C.F.R. § 3833.1-7(d) (1993).

Among other requirements, a claimant seeking the exemption had to be either producing between $1,500 and $800,000 in gross revenues from 10 or fewer claims "under a valid notice or plan of operations," or performing exploration work "under a valid notice or plan of operations," and have less than 10 acres of unreclaimed surface disturbance from such mining activity or such exploration work. 106 Stat. 1378, 1378-79 (1992). The applicable regulation, 43 C.F.R. § 3833.1-6(a)(4) (1993), implemented the statutory provision by requiring that mining claims be under:

> (i) One or more Notices or approved Plans of Operations pursuant to subparts 3802 or 3809 of [43 C.F.R.]; or
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> (ii) A Notice or Plan of Operations issued under parts 9 and 228 of Title 36 of the Code of Federal Regulations for National Park System lands and National Forest System lands respectively; or
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> (iii) A special use permit issued by a Federal agency for the mining or removal of locatable minerals; or
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> (iv) A State or local authority mining or reclamation permit if the surface estate of the mining claim is not in Federal ownership.

The certificate of exemption was required by 43 C.F.R. § 3833.1-7(d)(1) (1993) to set forth the serial number or other designation assigned by the pertinent agency to the notice, plan, or permit covering the mining claim or claims for which the exemption was sought.

Appellants submitted no rental fees for any of the claims at issue, but filed certificates of exemption from payment for both the 1993 and 1994 assessment years for all of them. The certificates included a copy of a plan of operations approved by the Forest Service on August 27, 1993, covering five claims: CAMC 57118 through CAMC 57120, CAMC 57124, and CAMC 115199. Although the plan originally proposed by Appellants covered all the mining claims and the mill site at issue here, they later deleted five mining claims from the plan after they were informed by the Forest Service that those five claims were within the boundaries of the San Mateo Canyon Wilderness Area and that a plan for those claims could not be approved absent a validity determination. 2/

In its March 1994 Decision, BLM declared the nine mining claims at issue abandoned and void because not all of those claims were under a "Notice or a valid Plan of Operations," citing 43 C.F.R. § 3833.1-6(a)(4) (1993), and noting that the Forest Service had not approved the plan for five of the claims. (Decision at 2.) The BLM declared the mill site abandoned and void for failure to pay the fees, stating that a mill site is "nonexempt," so "a claimant cannot file an exemption for payment of rental fees" for a mill site. (Decision at 2.)

[1] On appeal, Appellants assert that The General Nos. 1, 2, 3, 6, and 7 claims were not subject to the rental fee requirements because patent application CACA-31070 was filed on November 2, 1992, for those claims. Appellants refer to 43 C.F.R. § 3833.1-7(f) (1993), which provided in part as follows:

> Mining claims for which an application for a mineral patent has been filed, and the mineral entry has been allowed by the authorized officer pursuant to 30 U.S.C. 29 and § 3862.4-6 and 3862.5 of this title, are exempt from the payment of rental fee for the assessment years during which assessment work is not required pursuant to § 3851.5 of this title * * *.

However, under that regulation, the mere filing of a patent application was not sufficient to exempt the claims from payment of the rental fee; the "entry" had to be "allowed by the authorized officer" pursuant to the cited statutory and regulatory provisions. There is no evidence in the record of allowance of an entry by the authorized officer. See Jerry D. Grover, 139 IBLA 178, 179-80 (1997); U.A. Small, 108 IBLA 102 (1989). Accordingly, that regulation provides no support for Appellants' position, and those claims were subject to the rental fee requirement.

2/ We have recognized that an agency operating under a mandate to minimize surface disturbance may properly require a determination of the validity of a claim before approving operations. Richard C. Swainbank, 141 IBLA 37, 44 (1997), and cases cited.

[2] The five claims for which the patent application was filed were the same claims that were deleted from the plan of operations. Because those claims were not under a plan of operations on August 31, 1993, we must affirm BLM's Decision declaring those claims abandoned and void. As indicated above, a claimant seeking a small miner exemption from the payment of rental fees for mining claims located on National Forest lands must have been under a notice or a plan of operations issued under 36 C.F.R. Parts 9 and 228 on August 31, 1993. A claimant seeking the exemption, who did not have the claims under such a notice or plan of operations on August 31, 1993, was required to pay the rental fees for those claims, and, when no rental fees were paid on or before the deadline, the claims were properly declared abandoned and void. Diamond B. Industries, Inc., 138 IBLA 50, 52 (1997). The Department is without authority to excuse lack of compliance with the rental fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. Lee H. and Goldie Rice, 128 IBLA 137, 141 (1994).

Nevertheless, Appellants assert that these claims should be deemed eligible for the exemption because the Forest Service improperly excluded the claims from the approved plan. Even if Appellants are correct that the claims would qualify for approval of a plan of operations, the fact that approval had not been given by August 31, 1993, for whatever reason, precluded BLM from granting an exemption from the rental fee requirement. In Diamond B. Industries, Inc., supra, a case in which the claimant seeking a waiver of the fees obtained Forest Service approval of a plan in November 1993, we stated:

> We are aware that claimants who were not under notices or plans of operations were placed in a position in which they had to quickly obtain them in order to qualify for the small miner exemption. However, we find no flexibility in either the statute or implementing regulations that would allow a claimant additional time beyond August 31, 1993, to secure the required authorization. The small miner exemption was unavailable in such circumstances; the only way to preserve the claims was to pay the rental fees.

Id. at 54.

We note that Appellants' certificates of exemption were accompanied not only by a copy of a plan of operations, but also by a document captioned "Forest Service Notice of Intent" for the claims excluded from the plan of operations. Although the Act provides that a claim may be eligible for an exemption if it is under a valid notice or plan of operation, a notice cannot be considered "valid" if the operations proposed therein would occur on land where approval of a plan of operations is required. See David Paquin, 142 IBLA 40, 45 (1997).

[3] Although we affirm BLM's Decision for five of the claims not included in the plan of operations, BLM erred in holding that all of the

mining claims were abandoned. In Richard W. Taylor, 139 IBLA 231, 235 (1997), we held that when a party holding 10 or fewer claims meets the requirements for a small miner exemption for some of his claims, the fact that his other claims do not qualify for the exemption does not preclude the miner from obtaining an exemption for the claims that qualify. See also Richard W. Taylor, 136 IBLA 299, 302 (1996). Accordingly, we must reverse BLM's Decision with respect to the Overall, Iron Hoop, Horse Shoe, and The General No. 5 mining claims (CAMC 57118, CAMC 57119, CAMC 57120, and CAMC 115199) and remand the case for further action, because the sole reason given for declaring those claims abandoned and void was that the other claims were not under a plan.

Finally, we consider BLM's determination that the "All Iron Horse Mining Claim mill site" was "nonexempt" because it was a mill site. Appellants assert that the mill site was "abandoned" and that the claim serialized by BLM as CAMC 57124 was actually the All Iron Horse Mining Claim. (Notice of Appeal, Part I, at 2.) The record does not support Appellants' assertion that CAMC 57124 is the serial number for the All Iron Horse Mining Claim.

Review of the case records shows that on October 20, 1979, Jack Swain filed seven notices of location with BLM for recordation under section 314 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744 (1994). They were for the following claims: the Overall Lode Mining Claim, the Iron Loop Lode Mining Claim, the Horse Shoe Lode Mining Claim, The General No. 1 Placer Mining Claim, The General No. 2 Placer Mining Claim, the General No. 7 Placer Mining Claim, and the All Iron Horse Mill Site. The location notice for the mill site, styled as "MILL SITE LOCATION NOTICE," stated as follows:

> Notice is hereby given that we the undersigned proprietors of that certain Placer Mining Claim known as the All Iron Horse Mining Claim have this 23rd of February 1953 located 14 acres of nonmineral land to be known as the All Iron Horse Mill Site situate in the Tenaja Mining District, County of San Diego, State of California and described as in Lot 9 of Section 11, Township 8 South, Range 5 West, S.B.B. &M.

Accompanying the notices of location was a notice of intention to hold for "the Overall, Iron Hoop, Horse Shoe, and Generals No. 1, 2, and 7 Lode and Placer with Mill Site." Thus, it is clear that on October 20, 1979, Jack Swain sought to comply with the recordation and annual filing requirements of FLPMA for six mining claims and a mill site. However, there appears in the file a copy of a document issued by BLM in response to the filings stating that in all future correspondence references should be made to the "applicable serial number." The document then states:

> Your mineral locations have been assigned the following serial numbers.
> CAMC 57118 Overall
> CAMC 57119 Iron Hoop
> CAMC 57120 Horse Shoe
> CAMC 57121 The General No. 1
> CAMC 57122 The General No. 2
> CAMC 57123 General No. 7
> CAMC 57124 All Iron Horse Mining Claim

(Emphasis added.)

The BLM clearly made a mistake in assigning CAMC 57124 to the "All Iron Horse Mining Claim" and that may be the basis for the confusion over whether CAMC 57124 is the serial number for a mining claim or a mill site. Although Appellants contend that CAMC 57124 is the serial number for the All Iron Horse Mining Claim, there is no evidence in the record before the Board that the FLPMA filing requirements for that claim were satisfied. 3/ All evidence shows that Jack Swain sought to record the All Iron Horse Mill Site and the documentation in the record filed with BLM by him in October 1979 supports the recordation of a mill site properly assigned serial number CAMC 57124. Thus, we must conclude that CAMC 57124, at issue in this case, is the All Iron Horse Mill Site.

[4] The question is whether BLM properly declared the mill site abandoned based on its conclusion that a mill site is nonexempt and cannot be the subject of a rental fee exemption. Mill sites and tunnel sites were counted toward the 10-claim limit for claimants seeking an exemption from the rental fee requirements, and neither the statute nor the applicable regulations contain express language stating that mill or tunnel sites cannot qualify for the exemption.

The BLM's conclusion appears to be based on an inference drawn from the following statutory language:

> [E]ach claimant [qualifying as a small miner] may elect to either pay the claim rental fee * * * or in lieu thereof do assessment work required by the Mining Law of 1872 (30 U.S.C. 28-28e) and meet the filing requirements of FLPMA (43 U.S.C. 1744 (a) and (c)) on such ten or fewer claims and certify the performance of such assessment work to the Secretary.

(Emphasis added.)

Subsequent to the issuance of BLM's Decision in this case, the BLM Director issued Instruction Memorandum (IM) No. 94-257, entitled "Treatment

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3/ If the location notice for the All Iron Horse Mining Claim were never recorded with BLM, that claim would be deemed abandoned and void under 43 U.S.C. § 1744(c) (1994).

of Mill and Tunnel Sites Under the Exemption Provisions of the Rental Fee Segment of the Fiscal Year 1993 Department of the Interior Appropriations Act," dated August 5, 1994, wherein he stated:

> The 10-claim exemption language in the old rental fee statute specifically refers to a choice of doing assessment work or paying the fee on the 10 or more claims. It was interpreted that Congressional intent was that the 10 "claim" limit should also include sites. Because assessment work is not done on mill or tunnel sites, the statute was further interpreted to mean that the claimant must utilize the other choice and pay the $100 [rental] fee for the sites regardless of the fact that they may be included in a claimant's 10-claim limit. However, this interpretation unfortunately was never made a part of the regulations and * * * the Act itself is not explicit in this matter * * *.

Thus, the BLM Director realized that BLM's failure to codify this interpretation in the text of the regulation meant that it did not have the force and effect of law. See Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); Ashley Creek Phosphate Co., 134 IBLA 206, 226 (1995); United States v. Kaycee Bentonite Corp., 64 IBLA 183, 214, 89 Interior Dec. 262, 279 (1982).

Accordingly, in the IM the BLM Director announced the following policy: "Mill and tunnel sites can be exempted from payment of the rental fee if the small miner criteria [are] met. Decisions which have already been issued which void millsites contrary to this policy should be vacated."

Moreover, such a policy finds support in other language of the statute imposing the rental fee

> for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e) and the filing requirements of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)).

(Emphasis added.) Thus, if sites, for which no assessment work is required, were subjected to the rental fee requirement, it could be concluded that such a site would also be subject to the small miner exemption. 4/

4/ We note that in regulations promulgated to implement the maintenance fee requirements of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, 30 U.S.C. § 28f (1994), the Department provided that "[m]ill and tunnel sites of a qualified small miner, if listed upon the exemption certificate along with the affected lode and placer mining claims, are waived from payment of the maintenance fee." 43 C.F.R. § 3833.1-6(a)(3) (1994).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part and reversed in part and remanded for further action consistent with this Decision.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge